OFFICE OF THE POLICE COMMISSIONER
ONE POLICE PLAZA • ROOM 1400

CHAN

February 5, 2015

Memorandum for: Deputy Commissioner, Trials

Re: **Police Officer Airo Figueroa**
Tax Registry No. 943235
Military & Extended Leave Desk
Disciplinary Case No. 2013-9945

The above named member of the service appeared before Assistant Deputy Commissioner David S. Weisel on March 11, May 8, and August 19, 2014, and was charged with the following:

**DISCIPLINARY CASE NO. 2013-9945**

1. Said Police Officer Airo Figueroa, assigned to the 5th Precinct, on or about and between March 17, 2013 and May 17, 2013, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said officer wrongfully did ingest an anabolic steroid without police necessity or authority to do so.

**P.G. 203-10, Page 1, Paragraph 5** — **PUBLIC CONTACT-PROHIBITED CONDUCT GENERAL REGULATIONS**

2. Said Police Officer Airo Figueroa, assigned to the 5th Precinct, on or about and between March 17, 2013, and May 17, 2013, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer wrongfully did possess an anabolic steroid without police necessity or authority to do so.

**P.G. 203-10, Page 1, Paragraph 5** — **PUBLIC CONTACT-PROHIBITED CONDUCT GENERAL REGULATIONS**

In a Memorandum dated December 2, 2014, Assistant Deputy Commissioner David S. Weisel found the Respondent Guilty of Specification Nos. 1 and 2 in Disciplinary Case No. 2013-9945. Having read the Memorandum and analyzed the facts of this matter, I approve the findings, but disapprove the penalty.

Police Officer Figueroa's misconduct in this matter warrants his separation from the Department. However, with consideration of his prior service, reason for temperance against an outright dismissal from the Department is presented and I will permit an alternative manner of separation from the Department for Police Officer Figueroa at this time.

It is therefore directed that an ***immediate*** post-trial negotiated agreement be implemented with Police Officer Figueroa, in which he shall immediately file for vested-interest retirement, forfeit thirty-one (31) suspension days (previously served), be placed on one (1) year dismissal probation, waive all time and leave balances, including terminal leave, if any, and waive all suspension days, with and without pay, if any, and retire from the Department while on Suspended Duty status.

Such negotiated agreement shall also include Police Officer Figueroa's written agreement not to initiate administrative applications or judicial proceedings against the New York City Police Department to seek reinstatement or return to the Department. If Police Officer Figueroa does not agree to the terms of this negotiated agreement as noted, this Office is to be notified without delay. This agreement is to be implemented ***IMMEDIATELY.***

William J. Bratton
Police Commissioner

The City of New York

POLICE DEPARTMENT

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| In the Matter of the Disciplinary Proceedings | : | |
| - against - | : | FINAL |
| Police Officer Airo Figueroa | : | ORDER |
| Tax Registry No. 943235 | : | OF |
| Military & Extended Leave Desk | : | DISMISSAL |

Police Officer Airo Figueroa, Tax Registry No. 943235, Shield No. 17674, Social Security No. ending in [redacted] having been served with written notice, has been tried on written Charges and Specifications numbered 2013-9945, as set forth on form P.D. 468-121, dated June 17, 2013, and after a review of the entire record, has been found Guilty as Charged.

Now therefore, pursuant to the powers vested in me by Section 14-115 of the Administrative Code of the City of New York, I hereby DISMISS Police Officer Airo Figueroa from the Police Service of the City of New York.

WILLIAM J. BRATTON
POLICE COMMISSIONER

EFFECTIVE:

The City of New York

POLICE DEPARTMENT

December 2, 2014

| | | |
|---|---|---|
| In the Matter of the Charges and Specifications | : | Case No. |
| - against - | : | 2013-9945 |
| Police Officer Airo Figueroa | : | |
| Tax Registry No. 943235 | : | |
| Military & Extended Leave Desk | : | |

At: Police Headquarters
One Police Plaza
New York, New York 10038

Before: Honorable David S. Weisel
Assistant Deputy Commissioner - Trials

APPEARANCE:

For the Department: Lisa Bland, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Roger S. Blank, Esq.
373 Park Avenue South-6th Floor
New York, NY 10016

To:

HONORABLE WILLIAM J. BRATTON
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NEW YORK 10038

The above-named member of the Department appeared before the Court on March 11, May 8, and August 19, 2014, charged with the following:

1. Said Police Officer Airo Figueroa, assigned to the 5th Precinct, on or about and between March 17, 2013, and May 17, 2013, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said officer wrongfully did ingest an anabolic steroid without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS

2. Said Police Officer Airo Figueroa, assigned to the 5th Precinct, on or about and between March 17, 2013, and May 17, 2013, did engage in conduct prejudicial to the good order, efficiency or discipline of the Department in that said Officer wrongfully did possess an anabolic steroid without police necessity or authority to do so.

P.G. 203-10, Page 1, Paragraph 5 PUBLIC CONTACT – PROHIBITED CONDUCT GENERAL REGULATIONS

The Department was represented by Lisa Bland, Esq., Department Advocate's Office. Respondent was represented by Roger S. Blank, Esq.

Respondent pleaded Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

## RECOMMENDATION

Respondent is found Guilty.

## FINDINGS AND ANALYSIS

### Introduction

Respondent is charged with the possession and ingestion of steroids. He testified that he was an avid gym-goer. He liked to work out and often took supplements to increase his performance. He would buy them from stores like GNC. In April 2013, Respondent testified, he

was shopping in upper Manhattan, where he used to live. There were vendors set up on the sidewalk. Respondent told one of them that he was looking to build up his muscles. The vendor said that he had creatine, a supplement that aids in supplying energy to the muscles. Respondent had taken creatine in the past from GNC but this packet was cheaper. He bought the packet from the vendor. It contained a white powder, which he mixed with water and drank. About one month later, after being selected for a random drug test by the Department, Respondent tested positive for the presence of the metabolite of nandrolone, an anabolic steroid.

Respondent posited three main defenses: (a) that the testing was faulty; (b) that the evidence of nandrolone could be explained by legitimate natural or artificial processes; and (c) that any ingestion of nandrolone was innocent and unknowing.

The Testing Process

Respondent's testing samples were taken at the Medical Division's drug screening unit by Case Management Nurse Oscar Bellesia, who held the degree of registered nurse. Bellesia did not recall Respondent specifically but testified that generally he adhered to standard procedures. Here, that was for a urine test because Respondent's hair was too short to be taken as a sample. Bellesia testified that his practice was to positively identify the donor, to observe him urinate into a cup (a female Medical Division member would manage the process for a female donor), and then to test the urine's temperature to make sure it had come immediately from the human body. He had the donor pour from the cup into two vials. The donor was to seal the vials himself. The vials were sent by FedEx to Quest Diagnostics. Bellesia indicated that there was nothing unusual about Respondent's donation procedure, as he did not recall anything standing out.

Bellesia thus established that Respondent's urine samples were collected, packaged, sealed and transported properly to Quest for testing. Respondent pointed to nothing about his donation procedure to indicate that anything went wrong. If Bellesia did not remember Respondent then it must have gone smoothly. The mere possibility that something could have gone wrong is speculative and the Court rejects it. Cf. *Case No. 81240/05*, p. 67 (Apr. 24, 2006) ("It is abundantly clear" that officer's "head hair was carefully cut, packaged and sealed, by the Department, under a clean environment"), confirmed sub nom. Matter of Friscia v. Kelly, 51 A.D.3d 451 (1st Dept. 2008); *Case No. 70714/96 et al.*, Jan. 16, 1997, p. 42 ("[T]he Department amply proved that the samples were carefully obtained using a licensed laboratory's procedures"), confirmed sub nom. Matter of Brinson v. Safir, 255 A.D.2d 247 (1st Dept. 1998).

Dr. Barry Sample was Quest's chief scientific official relevant to this case. He was deemed an expert in the fields of forensic toxicology, anabolic steroids and performance-enhancing drugs. He defined anabolic steroids as being similar pharmacologically to testosterone. He stated that nandrolone was available in the United States only by prescription in injection form. It existed in powder form, but not legally.

Sample explained and interpreted the data contained in the laboratory data packages produced by Quest, DX 2 & 4. He testified that when nandrolone was ingested, it metabolized in the liver. Its most abundant metabolite was 19-norandrosterone (19-NA). The metabolite then entered the bloodstream and the urine. Sample established that Respondent's urine specimens were received by Quest with their seals intact. He testified that Respondent's first sample, A, contained 44 nanograms of 19-NA per milliliter of urine. The second sample, B, contained 41 ng/mL. The cutoff or threshold level the amount below which a specimen would be considered to have tested negative – was 2 ng/mL.

Respondent argued that the difference between the samples indicated that something was wrong with Quest's testing procedures. Sample disagreed and indicated that such variations were to be expected, as they were "well within the analytical variation of the method." As the Advocate argued, the difference of 3 ng was insignificant when the total amounts were so far above the cutoff of 2. The fact that 3 ng is nearly the cutoff level is irrelevant. The cutoff signified a conservative level above which the possibility of accidental ingestion or natural production could be excluded. There was no evidence that it bore any further significance.

Respondent was successful in getting Bellesia, the Medical Division nurse, to agree that the 3 ng/mL difference meant there was something wrong with the testing procedure. With no derogation to Bellesia's excellent credentials as a nurse, this was an opinion of no value. Bellesia was neither offered nor deemed an expert in the biochemical testing of drugs of abuse. He was not deemed any kind of expert, in fact, because his testimony called for no special scientific knowledge. He was very knowledgeable about the Medical Division's collection procedures but not about what happened at Quest, much less nanogram-level differences in donor specimens for a particular compound. Sample, the real expert on that subject, was asked whether the 41 vs. 44 difference was of any significance and said no. Bellesia was asked on re-direct examination and agreed that he could not testify about the results of Quest's testing.

Respondent argued that there was a possibility of human and mechanical error and variation within the Quest Diagnostics laboratory process. Nevertheless, Sample was familiar with the laboratory data packages prepared for Respondent's tests. As the chief science officer for Quest, Sample was responsible for all the technical and administrative aspects of the laboratory, including the performance of the certifying scientists. Sample was familiar with all of the steps taken and did not, as Respondent put it on summation, "presume[] that the procedure

is followed." Respondent raised no claim of a specific defect in the testing procedures. There is no reason, other than unvarnished speculation, to conclude otherwise.

Presence of 19-Norandrosterone

Respondent asked Sample about certain studies that indicated nandrolone or its metabolites could be present naturally in the human body for different people. Sample agreed that there was genetic variability in sex steroid production. He disagreed, however, that people who exercised or weightlifted a lot, and thus had variable muscle and fat production, could have different relevant metabolite production. Sample indicated that the possibility had been raised in the past and refuted by further studies. Specifically, there was no scientific evidence that intense exercise could lead to a higher level of 19-NA in urine. Any levels of 19-NA that might arise naturally, and not through artificial ingestion, were well below the laboratory cutoff. The natural potential amount was in the range of tenths of one nanogram.

Sample noted that downregulation, or negative feedback, was when a person ingested a hormone or hormone-like substance and the body's natural production of that substance went down. Upregulation, or positive feedback, was when the body naturally created a necessary substance due to a deficiency of it in the body. This fact was meaningless, Sample said, unless he also knew something specific about the individual in question. In any event, the Court notes Respondent provided no evidence that he had a natural tendency to produce more 19-NA.

Sample agreed that the hormone DHEA (didehydroepiandrosterone) could be found in supplements, even though it apparently was banned in sport. He was not aware of DHEA causing a positive result for 19-NA, although he allowed for the mere possibility. In any event, Respondent never testified that he took DHEA as a supplement.

Unknowing Innocent Ingestion

Respondent asserted that he ingested a substance he thought was creatine from a street vendor. This, he suggested, actually turned out to cause the positive 19-norandrosterone result. His claims were so ill-defined and puzzling as to be completely incredible. Respondent did not remember, other than within the range of a month, when he found this vendor. "Nothing specific" drew him to the vendor. He simply told someone selling there that he was looking for something to build up his muscles. On direct examination he described the supplement as coming in a foil package, on cross he said that it was a plastic container, and finally switched back to foil later on during cross. He did not remember what the label said. He did not remember reading the label or ingredients. Yet he claimed that these same foil creatine packets were sold at GNC. He looked for the vendor after the positive test result and could not find him.

When Respondent first was informed that he failed the test, he told investigators in informal questioning at the Medical Division that he took supplements from GNC and indicated that could have caused the positive result. When the investigators asked him if he could identify the products, he could not. When asked if they all could go to GNC so he could point out what he had taken, Respondent declined. He testified at trial that he believed the investigators wanted him to point out which product he thought caused the failure. He testified that he did not think it was the GNC supplements. This made no sense, however, in light of his testimony that at that time he had no idea what specifically made him fail the test. After the Medical Division meeting, Respondent even gave his prior attorney several GNC supplements so investigators could determine whether, for example, they contained nandrolone or a product that would render a positive 19-NA test. If he gave his attorney those products there is no reason he could not have

pointed them out to investigators. Thus he should have jumped at the chance to go to GNC at the time of the Medical Division meeting.

The most damning portion of Respondent's testimony was his claim that he did not remember buying the creatine from the street vendor when he was informed he failed the test. He was informed of this on or about June 14, 2013, at the Medical Division. That was perhaps two months after he supposedly bought the packet. This claimed failure of memory makes no sense. Respondent asserted that previously he had been buying supplements from GNC so the vendor interaction should have been a moment that stood out in his mind. Two months later, he failed a steroids test. He told the investigators on that day that he took GNC supplements. Yet he asserted that he did not put two and two together until his official interview at the latest, which was on July 18, 2013. This suddenly obtained memory of an incident that Respondent should have remembered easily and instantly as the catalyst for all his problems is not worthy of credence.

Respondent proposed that the investigators must have found his account of the vendor credible because they extensively investigated it. That was their duty as Department investigators. Had they done nothing with the information, Respondent would have contended that they ignored a colorable claim of innocence.

In sum, as the Department demonstrated that Respondent knowingly ingested and possessed anabolic steroids, without police necessity or authority, the Court finds him Guilty.

## PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to

the Department on January 10, 2007. Information from his personnel folder that was considered in making the penalty recommendation is contained in an attached confidential memorandum.

The Department recommended that Respondent be terminated from employment. It argued that steroids were a controlled substance and their illicit use was incompatible with being a police officer.

In *Case No. 2011-4578* (Sept. 4, 2012), the accused officer's friend and gym trainer injected him with what he told the officer was "deca." The officer supposedly did not know or attempt to find out what deca was. In fact, deca was short for Deca-Durabolin, a well-known and commercially-available form of nandrolone. The trial commissioner found the officer guilty but recommended 60 suspension days and one year dismissal probation as a penalty. The trial commissioner rejected the Advocate's view that steroid use should be treated in accordance with the general policy of termination for illegal controlled substances like marijuana, cocaine or heroin. Unlike these, some steroids can be obtained lawfully from a pharmacy via a physician's prescription. There were numerous disciplinary decisions where a member either had pleaded guilty or been found guilty of ingesting steroids outside the normal course of standard medical care, but termination was not imposed (see *4578*, pp. 26-28).

The Police Commissioner disagreed with the trial commissioner, however. The Commissioner wrote that the officer's "violation of Department policy was egregious and warrants separation from the Department." He ordered that the officer immediately be offered an agreement to file for vested-interest retirement. (see *4578*, Police Comm'r's Mem., p. 2).

The Police Commissioner, but not this tribunal, can offer a vested-interest retirement agreement in lieu of dismissal from employment, see Administrative Code § 14-115 (a). Therefore, the Court recommends that Respondent be terminated from employment with the

Department. See *Case No. 2013-10631* (July 18, 2014) (11-year police officer with no disciplinary record negotiated penalty of vested-interest retirement, 30 pre-trial suspension days and one-year dismissal probation for possessing and ingesting one or more anabolic steroids); *Case No. 81455/05* (Aug. 3, 2007) (23-year member dismissed for possessing and ingesting marijuana), confirmed sub nom. Matter of Chiofalo v. Kelly, 70 A.D.3d 423 (1st Dept. 2010).

Respectfully submitted,

David S. Weisel
Assistant Deputy Commissioner – Trials

DISAPPROVED
FEB 05 2015
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials

To: Police Commissioner

Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER AIRO FIGUEROA
TAX REGISTRY NO. 943235
DISCIPLINARY CASE NO. 2013-9945

Respondent received an overall rating of 3.5 "Highly Competent/Competent" on his 2012, 2011 and 2010 annual evaluations. [redacted]

On June 14, 2013, Respondent was suspended as a result of this case but otherwise has no prior formal disciplinary record.

For your consideration.

David S. Weisel
Assistant Deputy Commissioner Trials